

## **RESEARCH & RESOURCE COMMITTEE MEETING – REPORT**

### **June 27, 2012**

**Participants:** Carolyn Lazenby (Chair); Dr. Bill Canak; Shara Hamlett; Bill Mason; Jenny Taylor; and Nathan Burton participated by telephone conference.

**Members Absent:** Matthew Capece; John Finch; Michael Norse; Danny Odorn; Susan Ritter; and Bill Young.

#### **Items for Discussion - Address issues from the statute, T.C.A. § 50-6-919 (7, 8, 10, 11, 12, and 13):**

1. **(7)** Whether there are new ways to pool, focus and target investigative and enforcement resources relative to employee misclassification;
  - Whether the task force should explore the use of new information technologies so information can be shared between agencies. [ T.C.A. § 50-6-919(b) (7)(11) ]
    - Lack of integrated data between agencies and external sources: Access to and integration of data from various agency and entity sources will greatly assist investigation and enforcement.
    - Investigation will be assisted when investigators gain access to certain information reported to the National Council on Compensation Insurance ("NCCI") regarding details of the coverage in place for employers.
    - Fraud detection software would integrate and cull data from various sources to help identify noncompliant employers. *(Item from the "2012 Annual Report" as impediments to the effective operation of the task force)*
2. **(8)** New strategies for systematically investigating the failure of employers to properly classify individuals as employees;
  - Train Investigators - Provide certified training on both civil and criminal investigative techniques to ensure that investigators perform thorough and complete investigations that meet industry recognized standards (item proposed in the "2012 Annual Report").
  - Laws - The lack of administrative monetary penalties makes curbing employee misclassification difficult.
    - Existing Tennessee law does not authorize the TDLWD to assess administrative monetary penalties against employers for workers' compensation premium avoidance. *(Item from the "2012 Annual Report" as impediments to the effective operation of the task force)*
    - Existing law does not authorize TDLWD to issue stop work orders to offending employers. *(Item from the "2012 Annual Report" as impediments to the effective operation of the task force)*
3. **(9)** Whether improvements are needed to facilitate the filing of complaints and identify potential violators, including, but not limited to, soliciting referrals and other relevant information from the public;
  - Level the Playing Field - Develop reliable methods to encourage fair competition to assist Tennessee in restoring competitive equality for law abiding employers, particularly on publicly-funded projects (item proposed in the "2012 Annual Report").
  - Inadequate Criminal Penalties for Unemployment Insurance Fraud - Tying the monetary value of unemployment insurance fraud to the criminal theft statutes, where greater value thefts result in a higher criminal classification, would provide stiffer criminal sanctions which may present a more effective deterrent. This would imitate the existing scheme for workers' compensation fraud. *(Item from the "2012 Annual Report" as impediments to the effective operation of the task force)*

#### **Committee Response Combined for 7, 8 and 9:**

##### **➤ Data Mining**

- Model after other states would be a cost effective measure
- Check with the State of Washington to see if they may share their process
- Allows investigators to link up to different databases to identify "red flags"
- For example, captures a business with 20 trucks and no employees.
- Encourage use of process by enforcement in lieu of complaint driven, only, investigations (referrals from those under bid; attorneys; etc.)

##### **➤ Offer incentives and protection to those reporting violations**

##### **➤ Draw local government into these efforts by using their resources and expertise**

- Access to building permits; aware of projects, subdivisions going up, etc.
- Several of the investigators already have a good working relationship with local government

##### **➤ Random Checks as Low Cost Enforcement**

##### **➤ One (1) Staff Member to Perform Searches (cost recovered may cover employee)**

- Databases; Google; Other State and Local Agencies (Secretary of State; Unemployment Security; Local Codes Permits Online;
  - Research the State of Oklahoma's process of finding who are required to share and create a database
- Utilizing technical schools student departments

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4. (10) Changes in the law, if any, that need to be made in order to ensure that agencies represented by task force members investigating the failure of employers to properly classify individuals as employees under their own statutory or administrative enforcement mechanism have the authority to refer a matter to other participating agencies for assessment of potential liability under the other agencies' relevant statutory or administrative enforcement mechanisms;

- Collaborative Investigations - Conduct joint investigations and encourage member agencies and other entities to work together to make referrals, contact insurance carriers, report fraud, and coordinate efforts with the Tennessee Department of Commerce and Insurance (item proposed in the "2012 Annual Report").
- Insufficiency of Reported Information on State Projects - Enforcement capabilities on state-funded projects will be enhanced if the general contractor is required to report the names of all subcontractors and the subcontractors' workers' compensation insurance carriers to TDLWD prior to or at the beginning of work by the subcontractor. Investigations would be aided if the State Board for Licensing Contractors had the authority to share financial statements of applicants and licensees with other state agencies. *(Item from the "2012 Annual Report" as impediments to the effective operation of the task force)*

#### **Committee Response to 10:**

##### **➤ Determine the Definition of an Employee vs Independent Contractor**

- Need for a legal standard
  - ❖ Workers' Compensation has a definition
  - ❖ Unemployment Security had a definition
  - ❖ Federal Government (IRS) definition
  - ❖ Construction Services Provider definition

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5. (11) Innovative ways to prevent misclassification of employees by employers, such as through disseminating educational materials regarding the legal differences between independent contractors and employees;

- Whether the task force should explore the use of new information technologies so information can be shared between agencies. T.C.A. § 50-6-919(b) (7)(11)
  - What systems capabilities do other states use (i.e. Anti-Fraud Automated Detection System)? T.C.A. § 50-6-919(b)(11) *(item tabled from last study)*
    - Fraud Detection Software - Research the feasibility of obtaining fraud detection software and related databases. *(Item from the "2012 Annual Report" as impediments to the effective operation of the task force)*
6. (12) Methods by which public awareness of the illegal nature and harms inflicted by the failure of employers to properly classify individuals as employees can be increased; and
- **Educate Employers and Employees** – Establish a website including a fraud tip line and tip form (item proposed in the "2012 Annual Report"). Currently, a website including a fraud tip line and tip form, is operational at: <http://www.tn.gov/labor-wfd/EMEEF/>
7. (13) Any other issues relative to employee misclassification in the construction industry.

#### Committee Response to 11, 12 and 13

##### ➤ **Educate the Employer and Employee of the Definition**

- Add as a test question to the contractor's licensing exam;
- Item to attest to as part of the licensing applications, that they are aware of the employee definition (Yes or No)
- Create a fact sheet for the "employee" and/or anyone they "hire"; similar to the employment package with the W2 form *(can't say they didn't understand)*
  - ❖ Cost is minimal – Xerox copies
  - ❖ TOSHA Postings Requirement

##### ➤ **Fraud Detection Software and Estimated Cost**

- Check on getting a demo of fraud detection software and the estimated cost
  - ❖ Determine if it will be beneficial and cost effective
    - ⬇ A demo was provided by three (3) vendors on July 16<sup>th</sup> (Risk Metrics; CLEAR; and Rick Hale)

## **Next Meeting Goal and Topics**

### **1. Goal - Provide clear steps to take back to EMTAF**

- Tasks Assignments
- Time Lines (Interim Reports and Deliberations)

### **2. Topics**

- Policy
  - i. Look for things with no or low cost
  - ii. Set of incentives to follow
  - iii. Set of disincentives
- Retroactive for cost to the community
- Prohibit people from being able to license a contractor continuing to operate illegally
  - i. Database for identifying them; the need to take advantage of new technology
    - 1. Example: XYZ gets in trouble; then starts up a new corporation
- Take away the ability to form a Corporation or LLC
  - i. Law change to require the ownership information to be provided
  - ii. Money would be needed for a database to collect data and staff to operate
  - iii. Law to allow Secretary of State to revoke corporate registration for those with a revoked license (similar to ones with the Department of Labor and Revenue
    - Example: XYZ gets in trouble; then starts up a new corporation

(Note: Members may accumulate information for the next Research and Resource Committee)